BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2019- -E

IN RE:	)	
	)	
Ecoplexus Inc.	)	
	)	
Complainant,	)	**COMPLAINT**
	)	
v.	)	
	)	
South Carolina Electric & Gas Company,	)	
	)	
Defendant.	)	
	)	

INTRODUCTION

The Complainant, Ecoplexus Inc. ("Ecoplexus"), acting through its legal representative, pursuant to R-103-824 of the Public Service Commission of South Carolina's ("Commission") rules, hereby submits this complaint ("Complaint") against South Carolina Electric & Gas Company ("SCE&G"), showing specific violations of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), several provisions of 18 C.F.R. Section 292 (sometimes referred to herein as ""Section 292"), as well as specific violations of Commission orders as set forth herein. As will be demonstrated, SCE&G's numerous violations of PURPA, Section 292, and Commission orders, have materially harmed the development of Barnwell PV1, a 74.9 MW-ac solar qualifying facility ("QF"), queue position 332 ("Barnwell"), and Jackson PV1, a 71 MW-ac solar QF, queue position 331 ("Jackson") (collectively, the "Projects"), both owned by Ecoplexus.

NATURE OF ACTION

This action arises from SCE&G offering terms and conditions in power purchase agreements ("PPA") and interconnection agreements ("IA") for the Projects that violate PURPA, Section 292, and Commission orders. Further, the totality of SCE&G's actions suggests a broader pattern of discriminatory behavior towards the Projects.

COMPLAINANT

Ecoplexus is a Delaware Corporation and a developer of utility-scale solar photovoltaic and battery storage facilities, and has been in existence since 2008. Ecoplexus has developed and brought to commercial operation over 80 solar facilities worldwide totaling approximately 400 MW and representing approximately $600 million in project value. Ecoplexus is currently developing a pipeline of more than 6 GW of utility-scale projects across the U.S., Mexico, and Asia. Ecoplexus is headquartered in San Francisco, California, and has offices in Durham, North Carolina, and Dallas, Texas in the U.S.

DEFENDANT

SCE&G is a South Carolina Corporation, duly organized and conducting business in the State of South Carolina, and is a Public Utility subject to the jurisdiction of this Commission. SCE&G's address is 220 Operations Way, Cayce, South Carolina 29033.

NOTICE OF DISPUTE

Pursuant to Section 6.2 of the South Carolina Generator Interconnection Procedures for State-Jurisdictional Generator Interconnections (the "Interconnection Standards"), approved by the Commission, Ecoplexus tendered a written Notice of Dispute to SCE&G on December 21, 2018 (the "December 21, 2018 Notice of Dispute"[1]) describing in detail the contested issues

[1] The December 21, 2018 Notice of Dispute is attached hereto as Exhibit A.

regarding SCE&G's application of interconnection procedures. SCE&G declined to satisfy Ecoplexus' concerns, and Ecoplexus, SCE&G, and the South Carolina Office of Regulatory Staff had a conference on January 8, 2019 (the "January 8, 2019 Conference"), but no resolution was reached.

BACKGROUND

Following preliminary discussions between Ecoplexus and SCE&G related to Ecoplexus' preliminary offer to provide power to SCE&G, SCE&G provided Ecoplexus with a draft PPA for both Projects on March 28, 2017, which contained the Commission-approved PR-2 avoided cost rate for solar QF projects in effect at the time (the "Effective Rate"). SCE&G sent Ecoplexus an email on April 6, 2017 (the "April 6, 2017 Email"[2]), stating that the Commission has not established a policy for when and how a legally enforceable obligation ("LEO") is created in South Carolina, and that SCE&G's position on when an LEO under PURPA is established was set forth in Rebuttal Testimony of John H. Raftery in Commission Docket No. 2016-2-E ("Raftery Rebuttal Testimony") and in the Direct Testimony of John H. Raftery in Commission Docket No. 2016-89-E ("Raftery Direct Testimony").[3] On July 31, 2017, Ecoplexus responded with proposed changes to the PPAs for the Projects, and SCE&G acknowledged receipt on August 9, 2017. Further, queue positions for both Projects were established on August 17, 2017.

On September 11, 2017, Ecoplexus submitted a FERC Form 556 for both Projects, self-certifying each Project as a QF.[4]

[2] The April 6, 2017 Email is attached hereto as Exhibit B.

[3] The Raftery Rebuttal Testimony is attached hereto as Exhibit C, and the Raftery Direct Testimony is attached hereto as Exhibit D.

[4] *See* Federal Energy Regulatory Commission Docket No. QF17-1467-000 (Barnwell); FERC Docket No. QF17-1468-000 (Jackson).

Between August 2017 and April 2018, draft versions of the PPA were exchanged between SCE&G and Ecoplexus. SCE&G, however, never returned any comments to the PPA version that Ecoplexus sent to SCE&G on July 31, 2017. On April 25, 2018, Ecoplexus sent a letter to SCE&G related to the status of PPA negotiations (the "April 25, 2018 Letter"[5]), in which Ecoplexus stated that it was "reasserting its commitment to sell energy, capacity, and other attributes for QF's . . . to South Carolina Electric and Gas for Barnwell PV1 and Jackson PV1 . . . ."[6] On April 26, 2018, SCE&G responded to the April 25, 2018 Letter (the "April 26, 2018 SCE&G Response"[7]), but continued to refuse to provide a response to the markup of the PPA sent by Ecoplexus on July 31, 2017.

On April 30, 2018, the Commission issued Order No. 2018-322,[8] which, among other things, amended the PR-2 avoided cost rate for solar QF projects prospectively (the "Current Rate"[9]). The Current Rate approved in Order No. 2018-322 became effective for use on, during, and after the first billing cycle in May 2018.[10] Since the issuance of Order No. 2018-322, Ecoplexus and SCE&G have continued to negotiate terms for a PPA, however no PPA has been

[5] The April 25, 2018 Letter is attached hereto as Exhibit E.

[6] *See* April 25, 2018 Letter.

[7] The April 26, 2018 SCE&G Response is attached hereto as Exhibit F.

[8] Commission Order No. 2018-322, Docket No. 2018-2-E (Apr. 30, 2018) ("Order No. 2018-322").

[9] Under the Current Rate, the avoided energy cost for solar QFs is calculated as $0.02853/KwH for 2018-2022, while the capacity value of solar QFs is calculated as $0.00/KwH. *See e.g. id.* at 7. Both amounts reflect significant decreases from the Effective Rate.

[10] *See e.g.* Order No. 2018-322 at 45.

executed for either Project. Notably, the Current Rate has been reflected in each draft PPA offered by SCE&G since the April 26, 2018 SCE&G Response.[11]

During an August 14, 2018, phone call with SCE&G's transmission planning team, Ecoplexus requested the specific case models SCE&G used to evaluate the system impacts of the Projects so that it could verify SCE&G's methodology and results in its interconnection analysis. SCE&G refused to provide Ecoplexus with these models, and claimed that they were not required to share such information. On September 7, 2018, Ecoplexus received the system impact study results for each Project. On September 20, 2018, in reviewing the system impact study results for each Project at a meeting with SCE&G, Ecoplexus again raised concerns about the study assumptions and methodologies that SCE&G was utilizing, but was not able to fully evaluate SCE&G's results because it lacked the underlying case models. Ecoplexus also expressed concerns that the interconnection cost estimates associated with the Projects were not justified.

As noted, Ecoplexus tendered the December 21, 2018 Notice of Dispute to SCE&G, in which it once again requested that SCE&G provide it with the case models so that it could verify the system impact study results for the Projects that SCE&G had provided to Ecoplexus. Ecoplexus noted that Section 4.3.3 of the Interconnection Standards states that the interconnecting utility's system impact study "shall identify and detail" the impacts on the electric system of interconnecting a generating facility to evaluate the effect of the facility on distribution and transmission system reliability. These issues were once again discussed at the January 8, 2019 Conference. At the conclusion of the January 8, 2019 Conference, SCE&G did

[11] Many of the exchanges between SCE&G and Ecoplexus related to PPA terms since the issuance of Order No. 2018-322 have addressed how the avoided cost rate for energy storage may be calculated. However, Ecoplexus has chosen not to address this issue within the Complaint at this time.

not provide the case models to Ecoplexus, nor has it provided such models to Ecoplexus as of the date of this Complaint.

Ecoplexus executed IAs for each Project on February 11, 2019, and amended IAs were executed for each Project on April 12, 2019. Throughout the process of negotiating for each Project, SCE&G has routinely delayed in returning comments to Ecoplexus' proposed revisions, and many times has provided draft agreements that reject terms that were previously agreed to by Ecoplexus and SCE&G on a preliminary basis. SCE&G's conduct in negotiating has significantly infringed upon Ecoplexus' ability to execute PPAs for each Project with SCE&G in a timely manner.

COMPLAINT

I. Violations of The Public Utility Regulatory Policies Act of 1978 ("PURPA") and 18 C.F.R. Section 292

A. Ecoplexus is Legally Entitled To PPAs For The Project That Reflect The Effective Rate

i. Description of Applicable Law

1. Section 210 of PURPA requires the Federal Energy Regulatory Commission ("FERC") to prescribe rules "necessary to encourage cogeneration and small power production," including rules requiring that utilities offer to purchase the output of small power production facilities at rates that do not "discriminate against qualifying cogenerators or qualifying small power producers."[12] PURPA, in turn, directs the states to "implement" the regulations adopted by FERC.[13] As FERC has noted, a "state [c]ommission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other

[12] *See* 16 U.S.C. § 824a-3(a)-(b). As the owner of both Projects, Ecoplexus is a "qualifying small power producer."

[13] *See e.g. Grouse Creek Wind Park, LLC, Grouse Creek Wind Park II, LLC*, 142 FERC § 61,187, at P 33 (2013) ("*Grouse Creek*") (citing 16 U.S.C. § 824a-3(f); *accord FERC v. Miss.*, 456 U.S. 742, 751 (1982).

action reasonably designed to give effect to [the Commission's] rules."[14] Moreover, longstanding precedent has held that "a state may take action under PURPA only to the extent that that action is in accordance with [FERC's] regulations."[15]

2. FERC's regulations implementing PURPA are set forth in 18 C.F.R. Section 292. Importantly, Section 292.304 addresses rates for purchases of electricity from QFs by utilities, and Section 292.304(d) addresses purchases "as available" or pursuant to a LEO.[16] Section 292.304(d) reads in full:

> Each qualifying facility shall have the option either:
>
> > **(1)** To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or
> > **(2)** To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
> >
> > **(i)** The avoided costs calculated at the time of delivery; or
> > **(ii)** ***The avoided costs calculated at the time the obligation is incurred***.[17]

3. Notably, Section 292.304(d)(2) provides QFs with the option of being entitled to an avoided cost rate for sales of energy to a utility calculated *at the time that the LEO was incurred*, and FERC has "consistently affirmed the right of QFs to long-term avoided cost contracts or other legally enforceable obligations with rates determined at the time the obligation is incurred,

[14] *Grouse Creek* at P 33 (citing *FERC v. Miss.*, 456 U.S. at 751; *see also Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304, at 61,643 (1983)).

[15] See *Grouse Creek* at P 33.

[16] *See* 18 C.F.R. Section 292.304(d).

[17] *Id.* (emphasis added).

even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred."[18]

4. As described further below in Section I.A.iii, Ecoplexus established LEOs for each Project by April 25, 2018 at the latest, *which was before the Current Rate went into effect.* Accordingly, both Projects are entitled to receive the rate in effect on April 25, 2018, which was the Effective Rate. However, as described immediately below, SCE&G's indefensible position is that Ecoplexus has not even established a LEO to date, and therefore is not entitled to the Effective Rate.

ii. SCE&G's Standard For Establishing a LEO Violates PURPA and Section 292.304(d).

5. As acknowledged by SCE&G in the April 6, 2017 Email, this Commission has not established a state-wide standard for defining when a LEO arises.[19] Moreover, the April 6, 2017 Email states that the Raftery Rebuttal Testimony and Raftery Direct Testimony reflect SCE&G's position on when a LEO arises.[20]

6. In the Raftery Direct Testimony, which was submitted to the Commission after the Raftery Rebuttal Testimony, Mr. Raftery notably stated that "[I]n order for a LEO to exist, [SCE&G] believes that there must be sufficient commitments from a QF obligating itself to sell electricity to the utility, as well as a clear demonstration of the QF's ability to develop, construct

[18] *See JD Wind,* 130 FERC ¶ 61,127, at P 23 (2010). ("*JD Wind*").

[19] *See* April 6, 2017 Email. As of the date of this Complaint, it is Ecoplexus' understanding that the Commission has not established a state-wide standard for determining when a LEO arises, nor has it approved SCE&G's standard for establishing a LEO.

[20] *See* April 6, 2017 Email.

and deliver power within a defined period after the LEO is established."[21] Furthermore, Mr. Raftery stated that:

> Determining whether a LEO has arisen in a particular situation will depend upon, among other things, the status of any prior negotiations between the utility and the QF regarding entry into a PPA and interconnection agreement; the status of the QF's efforts in securing necessary contracts, including, but not limited to, those for operations and maintenance and construction of its facility; the steps the QF has taken to secure financing; the status of the QF's attempt to obtain environmental and other permits; and documents exchanged between the utility and the QF.[22]

7. Thus, per Mr. Raftery's testimony to the Commission, it appears that SCE&G essentially employed a "commitment and ability" standard, based on examining the totality of the circumstances, when determining whether a LEO arises. Further, Mr. Raftery stated that SCE&G requires the QF to deliver power within 180 days of establishing a LEO,[23] and "believes it is appropriate for the QF developer to have executed an interconnection agreement committing the utility to build any required facilities and committing the QF to interconnect to SCE&G's system by a specified date not more than 180 days in the future and for the QF developer to have paid any deposits required in such an interconnection agreement."[24]

8. Despite the foregoing representations by SCE&G, SCE&G did not apply the LEO standard articulated in Mr. Raftery's testimony to Ecoplexus' projects. Instead, SCE&G used, and has been using, a much more stringent approach. As explained by SCE&G in the April 26, 2018 SCE&G Response:

> SCE&G has consistently explained that, *in the absence of an executed PPA* between a QF and a utility as a result of conduct of the utility, a LEO arises if the QF can

[21] Raftery Direct Testimony Tr. at 5:16-20.

[22] *Id.* at 6:3-10.

[23] *See id.* at 8:7-9.

[24] *Id.* at 8:10-14.

> *demonstrate that it is able to deliver its electrical output to the utility within 180 days*. . .In short, Ecoplexus has not established a LEO.[25]

9. Notably, the April 26, 2018 SCE&G Response makes *no mention* of the factors that SCE&G supposedly weighed when determining whether a LEO exists, as Mr. Raftery testified to the Commission on *two occasions* in 2016. Instead, SCE&G's position in the April 26, 2018 SCE&G Response establishes its "default" LEO standard as the execution of a PPA with SCE&G, or alternatively, a QF's demonstrated ability to deliver power to SCE&G within 180 days. This LEO standard, as articulated by SCE&G in the April 26, 2018 SCE&G Response, and as applied to the Projects thereafter, is a blatant violation of both PURPA and FERC's controlling precedent addressing how state commissions and utilities may define when a LEO arises.

10. FERC has not established any specific definition for what constitutes a LEO, nor has it implemented any "bright-line" test in guiding a state's determination of defining when a LEO arises. However, while FERC generally leaves the issue of when and how a LEO is created to the states (and to nonregulated utilities when applicable), this "does not mean that a state commission is free to ignore the requirements of PURPA or the Commission's regulations."[26] However, by insisting that a LEO only arises when a QF signs a PPA or can demonstrate its ability to deliver power within 180 days, this is precisely what SCE&G has done.

11. FERC has repeatedly made clear that utilities cannot condition the establishment of a LEO on a QF entering into a contract, such as a PPA, with the utility. In fact, in FERC Order No. 69, FERC specifically addressed this issue, stating that:

[25] *See* April 26, 2018 SCE&G Response (emphasis added).

[26] *See JD Wind* at P 24.

> [Section 292.304(d)(2)] permits a qualifying facility to enter into a contract or other legally enforceable obligation to provide energy or capacity over a specified term. Use of the term "legally enforceable obligation" is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible facility merely by refusing to enter into a contract with a qualifying facility.[27]

12. Additional FERC precedent has made clear that utilities cannot condition the establishment of a LEO on a QF entering into a PPA or similar agreement. In *Cedar Creek Wind*,[28] FERC found that the Idaho public utility commission's decision to deny a QF a LEO on the basis that it had not entered into a Firm Energy Sales Agreement/Power Purchase Agreement with the utility was "inconsistent with PURPA and [FERC's] regulations implementing PURPA, particularly section 292.304(d)(2)."[29] FERC stated that "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations."[30] Accordingly, FERC concluded that "when a state limits the methods through which a legally enforceable obligation may be created to only a fully-executed contract, the state's limitation is inconsistent with PURPA, and our regulations implementing PURPA."[31]

13. Following the *Cedar Creek* precedent, FERC has explicitly clarified that "a legally enforceable obligation between a QF and a utility may exist regardless of the existence of a contract."[32] Given the foregoing, it is clear that SCE&G's insistence that Ecoplexus execute a

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[27] *See* Small Power Production and Cogeneration Facilities, FERC Order No. 69, 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980) (codified in 18 C.F.R. pt. 292) (available at https://www.ferc.gov/industries/electric/gen-info/qual-fac/orders/order-69-and-erratum.pdf).

[28] 137 FERC ¶ 61,006 (2011) ("*Cedar Creek*").

[29] *See id.* at P 30.

[30] *See id.* at P 32.

[31] *Id.* at P 35.

[32] *See Grouse Creek.* at P 38.

PPA in order to establish a LEO is a blatant violation of PURPA, Section 292.304(d)(2), and FERC's associated precedent.

14. Furthermore, SCE&G's alternative means for a establishing a LEO – the QF's demonstrated ability to deliver power to SCE&G within 180 days – is also a clear violation of PUPRA and Section 292.304(d)(2). As FERC has stated, "a QF, *by committing* itself to sell to an electric utility, also commits the electric utility to buy from the QF; these *commitments* result either in contracts or in non-contractual, but binding, legally enforceable obligations."[33] Requiring a QF to demonstrate its ability *deliver* power within a specified period of time, which can only occur *after* an interconnection agreement has been executed, is a clear violation of PURPA because it still effectively requires the execution of a contract. Moreover, from a practical perspective, for the reasons set forth in more detail below in Section I.B, the applicable terms of the IAs offered to the Project make it impossible for the Projects to deliver output within 180 days of executing an IA. Accordingly, SCE&G's effective standard for establishing a LEO is the execution of the PPA, which as described, is a violation of PURPA, Section 292.304(d), and FERC's controlling precedent.

iii. Ecoplexus Established a LEO By April 25, 2018 When the Effective Rate Was In Effect

15. In light of the fact that South Carolina has no state-wide standard for establishing a LEO, and given that SCE&G's standard for establishing a LEO is clearly impermissible, it is an open question of what standard the Commission should utilize in this proceeding when evaluating whether and when Ecoplexus established a LEO. In the absence of any such clear standard, Ecoplexus submits that the Commission should utilize the standard used by Dominion Energy

[33] See note 30, *supra* (emphasis added).

North Carolina ("Dominion NC") – which is now an affiliate of SCE&G. The standard utilized by Dominion NC, which complies with North Carolina's standard for evaluating when a LEO arises, is a reasonable standard because it is based on the QF's commitment to sell energy to the electric utility, in accordance with PURPA. Moreover, because the Dominion NC standard is appropriate for an affiliate of SCE&G in a neighboring state, it should reasonably suffice as a standard for evaluating whether a LEO arises for SCE&G in South Carolina.

16. In implementing the North Carolina LEO standard, Dominion NC utilizes a form that QFs must complete to notify Dominion NC that the QF is committed to selling its output to Dominion.[34] The Dominion NC Form sets out several significant criteria that must occur in order for a QF to commit itself to sell power to Dominion NC, and thus to establish a LEO. The relevant criteria can be summarized as: 1) executing the Dominion NC Form (thus providing written notice to the utility of the QF's commitment to sell its output to the utility); 2) filing a FERC Form 556; and 3) receiving, or being exempt from requiring, a CPCN. Moreover, the Dominion NC Form states that with respect to establishing a "LEO Date", if the QF is exempt from or has received a CPCN, the "LEO Date" is the date that the QF submits the Dominion NC Form; however, if the QF has applied for a CPCN and is awaiting approval, the LEO Date is the date that such approval is given.[35]

17. Applying these key provisions of the Dominion NC Form to the relevant facts applicable to the Projects, each Project was not required under South Carolina law to receive a CPCN,[36] and

[34] The form is attached hereto as Exhibit G ("Dominion NC Form"). The form is also available at https://www.dominionenergy.com/library/domcom/media/large-business/selling-power-to-dominion-energy/leo-form.pdf?la=en&modified=20180730193141

[35] *See* Dominion NC Form.

[36] *See* S.C. Code Ann. §§ 58-33 et seq., (2006) (requiring generation resources of more than 75 MW to obtain a certificate from the Commission. Because both Projects are less than 75 MW capacity, they are not required to obtain such a certificate).

a FERC Form 556 was submitted for each project on September 11, 2017. With respect to when Ecoplexus provided written notice to SCE&G of its commitment to sell the Projects' output to SCE&G, *at the latest* that occurred on April 25, 2018. On April 25, 2018, Ecoplexus stated that it was "reasserting its commitment to sell energy, capacity, and other attributes for QF's identified in Exhibit 1, to South Carolina Electric and Gas for Barnwell PV1 and Jackson PV1…"[37] Ecoplexus therefore unequivocally provided clear written notice of its commitment to sell the output for the Projects to SCE&G on April 25, 2018, at the latest. Ecoplexus thus established a LEO by April 25, 2018 at the latest, meaning that the Projects are entitled to the rate in effect as of that date, which was the Effective Rate.

18. Moreover, prior to April 25, 2018, Ecoplexus had already taken numerous actions which clearly established that it was committed to selling the output of the Projects to SCE&G. These actions included, but were not limited to:

- Entering into an lease option agreement on January 25, 2017, for the land that Barnwell was to be developed on, thus establishing site control for Barnwell;
- Entering into an lease option agreement on February 24, 2017, for the land that Jackson was to be developed on, thus establishing site control for Jackson;
- Providing SCE&G with proposed revised PPA terms on July 31, 2017;
- Establishing a queue position for both Projects by August 17, 2017; and
- Self-certifying each Project as a QF with FERC on September 11, 2017.

19. Therefore, even assuming *arguendo* that the Commission wished to evaluate whether a LEO arose by evaluating Ecoplexus' commitment to sell power to SCE&G by examining the

[37] *See* April 25, 2018 Letter.

totality of the circumstances, it is clear that Ecoplexus established a LEO by April 25, 2018 at the latest, and is therefore entitled to the Effective Rate even under the more subjective SCE&G standard articulated to the Commission on two occasions by Mr. Raftery in 2016.

B. The Interaction of Certain Terms in the PPAs and IAs Offered To The Projects Violate 18 C.F.R. 292.303

20. 18 C.F.R. 292.303 outlines electric utilities' general obligations under PURPA, and several terms in the PPAs and IAs offered for the Projects violate provisions of Section 292.303. First, Section 292.303(a), which related to utilities' obligation to purchase from QFs, reads in relevant part:

> **(a)** *Obligation to purchase from qualifying facilities.* Each electric utility shall purchase, in accordance with § 292.304, unless exempted by § 292.309 and § 292.310, any energy and capacity which is made available from a qualifying facility:
>
> **(1)** Directly to the electric utility[38]

21. Moreover, Section 292.303(c), which relates to utilities' obligation to interconnect, states in relevant part:

> **(c)** *Obligation to interconnect.*
>
> **(1)** Subject to paragraph (c)(2) of this section, any electric utility shall make such interconnection with any qualifying facility as may be necessary to accomplish purchases or sales under this subpart. The obligation to pay for any interconnection costs shall be determined in accordance with § 292.306.[39]

22. Put more succinctly, based on the foregoing provisions of Section 292.303, it is clear that utilities are required to: 1) purchase any energy and capacity which is "made available" from a QF, and 2) interconnect with the QF in order to accomplish such purchases. However, the

[38] *See* 18 C.F.R. Section 292.303(a).

[39] *See* 18 C.F.R. Section 292.303(c).

interaction between key PPA and IA terms required by SCE&G makes it impossible for SCE&G to comply with these requirements.

23. Notably, the draft PPA offered to Ecoplexus by SCE&G requires each Project to be in service within two years and one-hundred twenty days from the date that the PPA is executed. Failure to meet this deadline, on the face of the agreements, would result in Ecoplexus incurring liquidated damages and the PPA for either Project being terminated. However, the IAs for each Project establish June 5, 2023 as the date on which SCE&G is scheduled to approve each Project for parallel operation with SCE&G's system.[40] This means that even if Ecoplexus were to receive an executable PPA as of today's date, it would not be able to be in-service by the deadline required by the PPA because, per the terms of the IA, the Project cannot achieve commercial operation until at least June 5, 2023. Therefore, the PPA would certainly be terminated before the Project was approved to operate under the IA, which would in turn mean that the Project could not eventually interconnect. Alternatively, Ecoplexus would have to wait until at least February 5, 2021 to execute a PPA for the Projects, because that date is two years and one-hundred twenty days prior to June 5, 2023.[41]

24. Accordingly, taken together, the interaction of these terms of the PPA and IA make it impossible for Ecoplexus to sell the output of its Projects that is "made available" to SCE&G, as

[40] Moreover, SCE&G, not Ecoplexus, is responsible for constructing the network upgrades necessary to interconnect the Projects, meaning Ecoplexus has no ability to expedite the Projects' construction timeline and have the Projects in operation earlier.

[41] Ecoplexus believes that the PPAs, IAs, system impact studies, and associated materials for the Projects contain certain confidential information, and therefore out an abundance of caution, Ecoplexus is not submitting such documents as exhibits to this Complaint. However, Ecoplexus intends to request that the Commission establish procedures to exchange confidential information in the underlying proceeding at a later date, after which it will be able to provide the Commission and other appropriate parties with such documents.

required by Section 292.303(a), and from a practical standpoint, these terms make it practically impossible for Ecoplexus to interconnect the Projects, in violation of Section 292.303(c).

C. SCE&G's Offered Terms Deprive The Projects of Reasonable Opportunities to Attract Capital In Violation of Applicable FERC Precedent

25. The terms and conditions offered to date by SCE&G for the Projects have resulted in commercial terms that are unreasonable and are not financeable. This is a violation of FERC's 2016 *Windham Solar LLC*[42] decision, in which FERC held that "a legally enforceable obligation should be long enough to allow QFs reasonable opportunities to attract capital from potential investors."[43] While this holding by FERC is most directly applicable to the length of PPAs offered to QFs by utilities, Ecoplexus avers that it is also applies to the general terms and conditions that are to be applied to a QF for the sale of its output to a utility. Based on the aforementioned terms of the PPA and IA offered to Ecoplexus for the Projects, the Projects have not been afforded "reasonable opportunities to attract capital from potential investors," in violation of FERC's holding in *Windham Solar LLC*.

D. SCE&G's Clear PURPA Violations, Refusal to Provide Study Models, Unnecessarily Conservative Study Assumptions, Establish Discriminatory Treatment of The Projects

26. SCE&G's aforementioned clear violations of Section 292, along with actions and inactions outlined below related to the Projects' interconnection process, are indicative of SCE&G's pattern of discriminatory behavior towards the Projects. Such discriminatory behavior constitutes a violation of Section 292.306(a), which requires QFs to pay any interconnection costs assigned to them, provided that they are assessed by the utility "on a nondiscriminatory

[42] *Windham Solar LLC* et al., 157 FERC ¶ 61,134 (2016).

[43] *See id.* at P 8.

basis with respect to other customers with similar load characteristics."[44] The facts outlined immediately below demonstrate why SCE&G is engaging in discriminatory behavior towards the Projects, specifically with respect to the interconnection costs it has assigned to the Projects.

27. First, SCE&G's impermissible LEO standard described in Section I.A, together with the interaction of PPA and IA terms described in Section I.B, appear to be discriminatory. As described, SCE&G's LEO standard is a violation of PURPA and FERC's associated precedent. Further, the PPA and IA terms that SCE&G has offered to Ecoplexus for the Projects, if followed, would make it practically impossible for Ecoplexus to ever complete the Projects and deliver their output to SCE&G.

28. Second, SCE&G repeatedly denied Ecoplexus' reasonable requests to provide it with the case study models that were used to assign interconnection costs to the Projects as part of the applicable system impact studies. While SCE&G provided Ecoplexus with the applicable ATPER base model and allowed Ecoplexus to review the associated system impact study methodology, this information did not allow Ecoplexus to evaluate and verify the system impact study results for the Projects. This is because the base model provided to Ecoplexus was outdated and did not include SCE&G's latest system expansion plan, higher priority queued generation or associated system upgrades. Despite the fact that other utilities that Ecoplexus works with routinely provide these case study models upon request – including Duke Energy Progress, which is also regulated by the Commission[45] – SCE&G refused to provide Ecoplexus with the requested case study models.

[44] *See* 18 C.F.R. Section 292.306(c).

[45] *See* December 21, 2018 Notice of Dispute. Further, SCE&G's refusal to provide Ecoplexus with the requested case models is a violation of Section 4.3.3 of the Interconnection Procedures, which require the utility's system impact study to "*identify and detail* the electric system impacts that would result if the proposed Generating Facility were interconnected without project modifications or electric system modifications, or to study potential impacts."

29. Third, based on Ecoplexus' experience and analysis of the information currently available to it, including, but not limited to, the Projects' system impact study results and review of older models provided to it by SCE&G in accordance with SCE&G's FERC Form. 715,[46] Ecoplexus believes that the interconnection costs being assigned to each Project are invalid, discriminatory, and unreasonably high. Notably, SCE&G appears to have utilized study assumptions and methodologies that are arbitrary and unnecessarily conservative, which in turn has resulted in interconnection cost assignments to the Projects that are unreasonably high. This discriminatory treatment is highlighted by the way in which SCE&G appears to have used different facilities ratings for the Projects compared to its own facilities.

30. A facilities rating represents the operational limit on an element of the transmission system to ensure reliability and safety. SCE&G rates its own facilities in accordance with NERC Standard FAC-008-3, and files those ratings with FERC via FERC Form 715. Based on Ecoplexus' review of available information and discussions with SCE&G, when evaluating the need for upgrades to interconnect the Projects, SCE&G appears to have used facility rating criteria thresholds and methodologies *that were different and more conservative* from what SCE&G filed with FERC in its FERC Form 715 filing. If SCE&G had utilized the assumptions and methods that it uses for its own facilities in evaluating Jackson, Jackson would have had substantially lower interconnection costs than what has been assigned to it by SCE&G. This constitutes clear discriminatory behavior towards Jackson.

(emphasis added). SCE&G's refusal to provide Ecoplexus with the requested case models is a violation of this requirement.

[46] FERC Form 715 is an annual report related to transmission planning and evaluation submitted annually by FERC-jurisdictional transmission owners.

31. With respect to Barnwell, SCE&G stated that certain interconnection costs assigned to Barnwell were required based on Day Time Minimum system ("DTM") conditions, among other factors. As with the facilities rating conditions, based on Ecoplexus' analysis and understanding of SCE&G's FERC Form 715, DTM conditions are SCE&G's own set of system assumptions that are not used to evaluate its own facilities.

32. Importantly, in its numerous conversations with SCE&G, SCE&G never explained to Ecoplexus why SCE&G used more conservative and different standards in evaluating QFs compared to its own facilities. This treatment thus constitutes discriminatory treatment of QFs such as the Projects, which is a clear violation of PURPA and Section 292.306(a).

33. Last, SCE&G did not evaluate its system under "light load" conditions (*i.e.* below approximately 3,000MW) in the system impact studies for the Projects. Per the Projects' system impact studies, SCE&G did not evaluate the impact of the Projects during light load conditions despite the fact that such conditions accounted for approximately 57% of daytime hours on SCE&G's system from 2013-2016. Further, per the system impact study results, SCE&G concluded that the Projects' output may be curtailed during some hours during light load conditions, despite the fact that SCE&G did not actually evaluate its system under these light load conditions, nor did SCE&G evaluate the Projects' impact on its system during light load conditions. SCE&G thus appears poised to curtail the output of the Projects for up to 57% of its daytime hours, despite the fact that it did not evaluate the impacts of the Projects during these hours.[47]

[47] Ecoplexus is able to provide more detailed information substantiating the claims of discriminatory treatment outlined herein related to the assignment of interconnection costs once the Commission establishes procedures to enable the sharing of confidential information in this proceeding. *See* note 41, *supra*.

34. While one of these actions taken in isolation might not suggest a coordinated effort by SCE&G to discriminate against the Projects, the totality of the foregoing actions and inactions taken together does suggest such an effort.

II. Violations of Commission Orders

A. SCE&G Has Failed to Negotiate in Good Faith

35. SCE&G is under specific order from the Commission to negotiate in good-faith in its purchase of electrical energy from QFs.[48] However, based on the facts and circumstances outlined herein related to negotiating the Projects, SCE&G has violated this directive from the Commission.

CONCLUSION

For the aforementioned reasons, Ecoplexus prays for the following relief:

1) That the Commission direct SCE&G to offer PPAs for the Projects that reflect the Effective Rate;

2) That the Commission direct SCE&G to offer PPAs for the Project that would not require Ecoplexus to eventually terminate the PPA based on the facts set forth in Section I.B above;

3) That the Commission order SCE&G to assign interconnection costs to the Projects in a non-discriminatory manner, including as necessary, ordering SCE&G to amend the currently effective IAs for the Projects in order to effectuate such a result; and

4) That the Commission stay Ecoplexus' obligations to make certain payments for the Projects under the terms of the IAs, and to maintain the status quo of the IAs until the underlying proceeding initiated by the Complaint is resolved, as explained in more detail in Ecoplexus' Motion to Maintain Status Quo filed contemporaneously with this Complaint.

[Signature block on next page.]

[48] *See* Commission Order No. 85-347, Docket No. 80-251-E, at 34 (Aug. 2, 1985) ("Order No. 85-347").

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Jeremy C. Hodges

Weston Adams, III (SC Bar No. 64291)
E-Mail: weston.adams@nelsonmullins.com
Jeremy C. Hodges (SC Bar No. 71123)
E-Mail: jeremy.hodges@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Complainant

Columbia, South Carolina

Dated: April 15, 2019.

EXHIBIT A

ecoplexus

BILLING ADDRESS:
3901 Arlington Highlands Blvd.
Ste. 200
Arlington, TX 76018

101 Second Street, Ste. 1250
San Francisco, CA 94105
T 415 626 1802
F 415 449 3466

807 East Main Street, Ste. 6-050
Durham, NC 27701

www.ecoplexus.com

Mr. Lee Xanthakos
Vice President, Electric Transmission
South Carolina Electric & Gas

Via E-Mail

December 21, 2018

RE: Notice of Dispute, SCGIP Section 6.2.2 – Ecoplexus, Inc., Barnwell PV1 & Jackson PV1

Dear Mr. Xanthakos,

Pursuant to the section 6.2.2 of the South Carolina Generator Interconnection Procedure (SCGIP), the purpose of this letter is for Ecoplexus, Inc. ("Ecoplexus") to provide South Carolina Electric & Gas ("SCE&G") with written notice of dispute regarding SCE&G's failure to provide Ecoplexus with necessary project case studies and assumptions to verify and validate the System Impact and Facilities Studies for Ecoplexus' two proposed qualifying facilities (QFs), Barnwell PV1, a 74.9 MW-ac facility, queue position 332 ("Barnwell"), and Jackson PV1, a 71 MW-ac facility, queue position 331 ("Jackson"), as required by Section 4.3.3 of the SCGIP. Ecoplexus has unsuccessfully attempted to resolve this dispute to its satisfaction through repeated requests, communications, and meetings with SCE&G, as required by Section 6.2.1 of the SCGIP.

In violation of Section 4.3.3 of the SCGIP, SCE&G has refused to share study case models used to evaluate the system impacts of Ecoplexus' QF projects, including Barnwell and Jackson, which would enable Ecoplexus to understand the projects' potential impacts on the electric system as described in the System Impact Reports. Section 4.3.3 of the SCGIP states that the interconnecting utility's system impact study "shall identify and detail" the impacts on the electric system of interconnecting the generating facility to evaluate the effect of the project on distribution and transmission system reliability. Detailed information about the model methodology and assumptions used in the system impact study is critical for independent power producer to understand and validate the interconnecting utility's study results. Without access to the underlying details behind the study, Ecoplexus has not been able to validate SCE&G's results. For instance, at the system impact study review on September 20, 2018, Ecoplexus raised concerns with SCE&G about the study assumptions and methodology but was not able to fully evaluate SCE&G's results because it lacked the study case models.

During an August 14, 2018 phone call with SCE&G's transmission planning team, Ecoplexus requested the specific case models SCE&G used to evaluate the system impacts of Barnwell and Jackson. SCE&G refused, claiming they are not required to share that information under the state interconnection process. Additionally, Ecoplexus provided SCE&G with a July 18, 2017, letter of release from the Federal Energy Regulatory Commission (FERC) authorizing Ecoplexus to obtain power flow studies under FERC's critical energy/electrical infrastructure information (CEII) regulations. In that letter, FERC deemed Ecoplexus "a legitimate requester with a need for the information."[1]

The one piece of information that SCE&G has been willing to share is its annual FERC-715 data from the SCRTP Secure Website, which SCE&G provided in early August. However, the FERC-715 data only represents the base case models submitted annually by SCE&G which quickly become stale, (as a result of continuous changes in a Transmission Provider's system expansion plan), and not the specific study case

[1] [FERC Letter]

models that evaluate the impact of Ecoplexus' projects on the electrical system accounting for the latest system expansion plan, higher priority generator interconnection requests along with their associated system upgrades. In its August 31, 2018, letter, Ecoplexus acknowledged that SCE&G had provided access to the ATPER base model, but repeated and clarified that it was still requesting SCE&G provide the "study specific models which include the latest system expansion plan, higher priority queued generation and associated system upgrades."[2] Nevertheless, SCE&G declined Ecoplexus' request, stating that it "has provided all relevant information."[3]

Furthermore, SCE&G claims the SCRTP website is the means by which general model data is shared. However, the SCRTP website does not provide the most up-to-date models used in the studies for Barnwell and Jackson and therefore does not satisfy the requirements of SCGIP Section 4.3.3.

Following review of the System Impact Study reports for Jackson PV1 and Barnwell PV1, Ecoplexus respectfully disagrees with SCE&G's results pertaining the "Required for Interconnection", "Required for Firm" System Upgrades, as well as the Generation Curtailment scenarios. SCE&G's results stem from study assumptions and methodologies that significantly deviate from those utilized in System Reliability Assessment as well as in Generation Interconnection technical guidelines. The "Required for Interconnection" and "Required for Firm" system upgrades, as well as the curtailment plan for both Jackson and Barnwell projects follow the compound effect of SCE&G's transmission facilities' derating methodology, SCE&G's Light-load and DTM (Day Time Minimum) underlying study assumptions, and SCE&G's interpretation of applicable NERC Reliability Standards as previously stated via email communication [4].

Notably, based on Ecoplexus' direct experience, Duke Energy Carolinas, Duke Energy Progress, Florida Power & Light, Southern Company, PJM, Duke Energy Florida and Tampa Electric have taken the opposite position from SCE&G; in the course of evaluating system impacts of other generating facilities, these transmission suppliers have provided Ecoplexus with detailed case studies used in their system impact studies. For its part, the Federal Energy Regulatory Commission (FERC) has addressed this issue for qualifying facilities subject to its jurisdiction for interconnection. Section 7.4 of its Standard Large Generator Interconnection Procedures (LGIP) states: "Upon request, Transmission Provider shall provide Interconnection Customer *all supporting documentation, work papers and relevant pre-Interconnection request and post-interconnection request power flow, short circuit and stability databases* for the interconnection System Impact Study, subject to confidentiality arrangements…" (emphasis added).

Ecoplexus appreciates SCE&G's attention to this matter and hopes that it can be resolved promptly in a manner that complies with all applicable regulations. Ecoplexus would welcome a meeting with the relevant individuals to discuss Ecoplexus' request and reasoning in more detail.

Sincerely

Michael Wallace
Vice President, Southeast Development
mwallace@ecoplexus.com

[2] Letter from Michael Wallace, Ecoplexus, to Pandelis Xanthakos, SCE&G, "RE: Response to South Carolina Electric and Gas Company's Response to Ecoplexus' Notice of Interconnection Process Dispute Winnsboro PV1" (August 31, 2018).
[3] Letter from Pandelis Xanthakos, SCE&G to Michael Wallace, Ecoplexus, "RE: South Carolina Electric and Gas Company's Response to Ecoplexus's August 31, 2018 Letter" (September 17, 2018).
[4] "Technical Review of Jackson and Barnwell Studies with SCE&G" (November 27, 2018)

EXHIBIT B

---------- Forwarded message ----------
From: **FOLSOM, JOHN E JR** <EFOLSOM@scana.com>
Date: Thu, Apr 6, 2017 at 4:55 AM
Subject: RE: Confidential Draft Form of Solar QF PPA
To: John Gorman <johng@ecoplexus.com>

John,

I look forward to receiving your red-line and comments to SCE&G's form of PPA. To date, the Public Service Commission of South Carolina has not decided when and how a LEO is created in South Carolina. SCE&G has set forth its position on when a LEO is established in the Rebuttal Testimony of John H. Raftery in Public Service Commission of South Carolina ("PSC") Docket No. 2016-2-E and in the Direct Testimony of John H. Raftery in PSC Docket No. 2016-89-E.

In terms of next steps and timing, we will certainly work to move the process forward in a reasonable manner once we receive your comments on the PPA.

We can discuss in more detail during our next phone call.

Thanks,

Eddie

EXHIBIT C

REBUTTAL TESTIMONY OF

JOHN H. RAFTERY

ON BEHALF OF

SOUTH CAROLINA ELECTRIC & GAS COMPANY

DOCKET NO. 2016-2-E

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is John Raftery and my business address is 220 Operation Way, Cayce, South Carolina.

Q. HAVE YOU PREVIOUSLY SUBMITTED DIRECT TESTIMONY IN THIS PROCEEDING?

A. I have.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. The purpose of my rebuttal testimony is to discuss South Carolina Electric & Gas Company's ("SCE&G" or the "Company") response to a portion of the direct testimony of Mr. Paul Fleury filed on behalf of the South Carolina Solar Business Alliance.

Q. ON PAGE 2, LINES 3 THROUGH 6 OF HIS DIRECT TESTIMONY, MR. FLEURY ASKS SCE&G TO EXPLAIN WHAT IS REQUIRED FOR A QUALIFYING FACILITY TO ESTABLISH A LEGALLY ENFORCEABLE OBLIGATION ("LEO"). WHAT IS YOUR RESPONSE TO THIS REQUEST?

A. FERC regulation gives QFs, including solar electric generators up to 80 MW, the option to provide energy or capacity to a utility on an "as available" basis or pursuant to an LEO. See 18 C.F.R. 292.304(d). If a QF elects to sell its power pursuant to an LEO, the Public Utilities Regulatory Policy Act of 1978 ("PURPA") requires that rates paid to the QF are set at the utility's avoided costs and are calculated at the time the LEO is established.

As I understand it, the LEO was specifically adopted by the FERC under PURPA to prevent utilities from circumventing the requirement to purchase energy and capacity from QFs by unreasonably delaying or refusing to enter into or negotiate purchase power agreements ("PPAs") with QFs. Essentially, a QF, by committing itself to sell to the utility, also commits the utility to buy from the QF; these commitments result either in an executed PPA or in non-contractual, but still binding, "legally enforceable obligations," when there is clear evidence of a commitment by the QF to sell to the utility as described hereinafter.

Mr. Fleury has not alleged that SCE&G has attempted to delay entering into PPAs or negotiated with QFs in anything other than a good faith manner. Indeed, since the passage of Act 236 in 2014, SCE&G has entered into eight (8)

PPAs with QFs—four (4) in 2015 and four (4) to date in 2016. Rather, it appears that Mr. Fleury is requesting that the Company (and indirectly this Commission) provide its opinion on what is required for the QF to make the required binding "commitment to sell" – thereby creating an LEO – in the event that a dispute between SCE&G and a QF developer should arise in the future.

The first thing to recognize when examining the issue is that the FERC has not defined what constitutes an LEO. Instead, PURPA and the FERC provide state regulatory commissions with wide latitude to define when and how an LEO is created. Because Mr. Fleury has not alleged that any dispute exists that is ripe for Commission determination, the Commission could, consistent with PURPA, decline to rule on the LEO issue in this docket. However, should the Commission decide to take up the LEO issue in this proceeding, the Company presents its general position on the commitment to sell that is minimally necessary for a QF to establish an LEO.

First, I would emphasize that an LEO under PURPA commits both the QF to sell, and a utility to purchase, the electric output from a QF's facility. Creation of an LEO requires a binding commitment by the QF to sell the generated electricity. It is not simply an option for the QF to sell power to the utility if and when it so chooses.

For this reason, in order for an LEO to exist, the Company believes that there must be sufficient commitments from a QF obligating itself to sell electricity to the utility, as well as a clear demonstration of the QF's ability to develop,

construct and to deliver power from its facility within a defined period after the LEO is established. A mere statement that the QF intends to sell electricity to the utility or has taken preliminary development steps that can easily be abandoned without consequence (e.g., filing an interconnection request or self-certifying a proposed facility as a QF) is insufficient to establish a LEO.

Determining whether an LEO has arisen in a particular situation will depend upon, among other things, the status of any prior negotiations between the utility and the QF regarding entry into a PPA and interconnection agreement; the status of the QF's efforts in securing necessary contracts, including, but not limited to, those for operations and maintenance and construction of its facility; the steps the QF has taken to secure financing; the status of the QF's attempt to obtain environmental and other necessary permits; and documents exchanged between the utility and the QF.

In addition to the factors just discussed, SCE&G believes that it is imperative that the QF be able to honor its commitment to begin delivering power to the utility within a defined period. As noted above, payments to a QF under an LEO are based on estimates of a utility's avoided costs calculated at the time the LEO is established. Given that the utility's avoided cost changes over time, if the time between the establishment of an LEO (i.e., the QF's commitment to sell) and actual power delivery by the QF is lengthy, it is likely the avoided costs at the time of delivery of the power will be different (higher or lower), perhaps dramatically, than the avoided costs estimates at the commencement of the LEO. For example,

without a defined delivery deadline, a QF could "commit" to sell in 2016 at 2016 avoided cost rates, but not build the generator and commence delivering power until 2019. SCE&G's avoided costs may have substantially changed during this delay period. If avoided cost rates have decreased, there is no guarantee that SCE&G's customers will benefit because a QF with an LEO rather than a contract can simply walk away from its "commitment" to the deliver the output of its facility to SCE&G. If on the other hand, avoided cost rates have increased, SCE&G customers cannot walk away and must pay the QF the stale 2016 above-avoided cost rates.

The Company recognizes that certainty in terms of the utility's avoided cost rates is important to QFs. It is equally important for SCE&G to be able to rely upon the QF's binding commitment to provide energy and capacity as of a specified date that can then be used to serve customers. Some jurisdictions, such as North Carolina, require larger QFs to obtain a Certificate of Public Convenience and Necessity ("CPCN") as a prerequisite step to establishing a LEO. Because QFs with a nameplate capacity of 75 MW or less are not required to obtain CPCNs in South Carolina, the Company does not believe North Carolina is a model to follow. Other jurisdictions have established bright-line LEO tests, including requiring a QF to express a binding commitment to execute a PPA with a price term consistent with the utility's avoided cost, for a specified term (including start and end dates) and with sufficient guarantees to ensure performance during the term of the contract. Some jurisdictions also require a QF

to obtain an executed interconnection agreement to establish an LEO. In Texas, a QF can only establish an LEO within ninety days of the date on which it will be able to deliver power from its facility. This so-called 90-day rule has been upheld on appeal by a federal appellate court, and ensures that the LEO is not an indefinite option for the QF to put its power to the utility at rates which no longer accurately reflect the utility's avoided costs. While the Company could certainly accept the 90-day rule, it believes that giving a QF 180 days after establishment of the LEO to commence delivery of power strikes the appropriate balance between the QF's interest and those of SCE&G's customers. The Company also believes it is appropriate for the QF developer to have executed an interconnection agreement committing the utility to build any required facilities and committing the QF to interconnect to SCE&G's system by a specified date not more than 180 days in the future and for the QF developer to have paid any deposits required in such interconnection agreement.

Q. ON PAGE 2, LINES 10 THROUGH 11 OF HIS TESTIMONY, MR. FLEURY ASKS WHETHER SCE&G PLANS TO SEEK APPROVAL OF A PPA WITH STANDARD TERMS AND CONDITIONS THAT APPLY TO ANY QF THAT QUALIFIES FOR SCE&G'S PR-2 TARIFF. WHAT IS YOUR RESPONSE TO THIS REQUEST?

A. Consistent with the Commission Order Nos. 81-214 and 85-347, SCE&G has engaged in voluntary negotiations with QFs for long term PPAs and has

submitted PPAs to the Commission for review and approval once a PPA has been finalized and executed. The Company believes the Commission's direction in these orders remains prudent and reasonable and SCE&G plans to continue to following the directions set forth in these orders. Therefore, at this time, the Company does not plan to propose or seek approval of a standard PPA form.

Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes.

EXHIBIT D

DIRECT TESTIMONY OF

JOHN H. RAFTERY

ON BEHALF OF

SOUTH CAROLINA ELECTRIC & GAS COMPANY

DOCKET NO. 2016-89-E

Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS, AND OCCUPATION.

A. My name is John H. Raftery. My business address is 220 Operation Way, Cayce, South Carolina. I am the General Manager of Renewable Products/Services and Energy Demand Management for South Carolina Electric & Gas Company ("SCE&G" or the "Company").

Q. STATE BRIEFLY YOUR EDUCATION, BACKGROUND, AND EXPERIENCE.

A. I am a graduate of Northwestern University with a Bachelor of Science degree in Mechanical Engineering. I began my public utilities career in 1994 as an Information Technology Management Consultant with Price Waterhouse and continued with Oracle Corporation in 1998. I joined SCANA Corporation in 2003 as a Client Manager in the Customer Systems Support Organization and gained the responsibilities of the Customer Service Training Department several years later. In 2010, I assumed responsibility for the SCANA Contact Centers and Technology

Services, with the addition of SCE&G's Business Offices in 2013. In November 2014, I assumed my current role as General Manager of Renewable Products/Services and Energy Demand Management.

Q. HAVE YOU TESTIFIED PREVIOUSLY BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA (THE "COMMISSION")?

A. Yes, I have testified before the Commission on two occasions. More specifically, I have testified before the Commission in support of SCE&G's Petition for Approval to Participate in a Distributed Energy Resource Program in Docket No. 2015-54-E and most recently, in SCE&G's Annual Review of Base Rates for Fuel Costs in Docket No. 2016-2-E.

Q. WHAT IS THE PURPOSE OF YOUR DIRECT TESTIMONY?

A. The purpose of my direct testimony is to respond to a portion of the direct testimony of Mr. Jonathan Burke and Philip T. Lacy filed on behalf of Lily Solar LLC ("Lily Solar") in which they state that a legally enforceable obligation ("LEO") was created between SCE&G and Lily Solar at an initial scoping meeting on March 3, 2015, concerning the interconnection of Lily Solar's proposed renewable energy generating facility to SCE&G's transmission system. I also present to the Commission the Company's position on what constitutes a LEO. I conclude my direct testimony by requesting that the Commission find that no LEO has been established between SCE&G and Lily Solar.

Q. ON PAGE 3, LINES 12 THROUGH 14 OF HIS DIRECT TESTIMONY, PROFESSOR LACY STATES THAT A LEO WAS CREATED BETWEEN SCE&G AND LILY SOLAR BY ORAL AGREEMENT ON MARCH 3, 2015. LIKEWISE, MR. BURKE ON PAGE 23, LINES 8 THROUGH 9 OF HIS DIRECT TESTIMONY REQUESTS THAT THE COMMISSION RECOGNIZE THAT A LEO HAS OCCURRED. WHAT IS YOUR RESPONSE TO THESE STATEMENTS?

A. Federal Energy Regulatory Commission ("FERC") regulation gives qualifying facilities ("QFs"), including solar electric generators up to 80 MW (such as Lily Solar), the option to provide energy or capacity to a utility on an "as available" basis or pursuant to an LEO. See 18 C.F.R. 292.304(d). If a QF elects to sell its power pursuant to an LEO, the Public Utilities Regulatory Policy Act of 1978 ("PURPA") requires that rates paid to the QF are set at the utility's avoided costs and are calculated at the time the LEO is established.

As I understand it, the LEO was specifically adopted by the FERC under PURPA to prevent utilities from circumventing the requirement to purchase energy and capacity from QFs by unreasonably delaying or refusing to enter into or negotiate purchase power agreements ("PPAs") with QFs. Essentially, a QF, by committing itself to sell to the utility, also commits the utility to buy from the QF; these commitments result either in an executed PPA or in non-contractual, but still binding, "legally enforceable obligations," when there is clear evidence of a commitment by the QF to sell to the utility as described hereinafter.

Lily Solar has not alleged that SCE&G has attempted to delay or refused to enter into a PPA with it thereby circumventing the requirement to purchase energy and capacity. Instead, Lily Solar complains about the draft Interconnection Agreement that SCE&G presented to it. A draft Interconnection Agreement and a PPA are two separate and distinct agreements, which are negotiated by separate departments on behalf of SCE&G. As SCE&G witnesses Matthew J. Hammond testifies, he is responsible for interconnection matters and SCANA Corporation's Power Marketing department, on behalf of SCE&G, is responsible for PPAs.

It appears that by way of its complaint in this docket, Lily Solar is attempting to lock-in SCE&G and ultimately, its customers into a 2015 avoided cost price point by using a meeting to discuss interconnection matters as the event that establishes the LEO. SCE&G strongly disagrees with Lily Solar that a LEO was created at the initial scoping meeting concerning interconnection matters.

Q. HAS THE COMMISSION DEFINED WHAT CONSTITUTES A LEO?

A. The first thing to recognize when examining the issue is that the FERC has not defined what constitutes an LEO. Instead, PURPA and the FERC provide state regulatory commissions with wide latitude to define when and how an LEO is created; however, the Commission has not exercised its right to define what constitutes a LEO. In light of the manner in which Lily Solar has attempted to present this issue to the Commission, the Commission should expressly reject Lily Solar's request that a LEO was established at the initial scoping meeting concerning interconnection matters. However, should the Commission decide to take up the

LEO issue in this proceeding, the Company presents its general position on the commitment to sell that is minimally necessary for a QF to establish an LEO.

Q. WHAT IS THE COMPANY'S POSITION ON WHAT CONSTITUTES A LEO?

A. In Docket No. 2016-2-E, the South Carolina Solar Business Alliance ("SBA"), of which Lily Solar's parent company NARENCO is a trade member, requested that SCE&G explain what is required for a QF to establish a LEO. In that docket, I responded to the SBA's request and as more fully set forth below affirm the Company's position of what constitutes a LEO.

First, I would emphasize that an LEO under PURPA commits both the QF to sell, and a utility to purchase, the electric output from a QF's facility. Creation of an LEO requires a binding commitment by the QF to sell the generated electricity. It is not simply an option for the QF to sell power to the utility if and when it so chooses.

For this reason, in order for an LEO to exist, the Company believes that there must be sufficient commitments from a QF obligating itself to sell electricity to the utility, as well as a clear demonstration of the QF's ability to develop, construct and to deliver power from its facility within a defined period after the LEO is established. A mere statement that the QF intends to sell electricity to the utility or has taken preliminary development steps that can easily be abandoned without

consequence (e.g., filing an interconnection request or self-certifying a proposed facility as a QF) is insufficient to establish a LEO.

Determining whether a LEO has arisen in a particular situation will depend upon, among other things, the status of any prior negotiations between the utility and the QF regarding entry into a PPA and interconnection agreement; the status of the QF's efforts in securing necessary contracts, including, but not limited to, those for operations and maintenance and construction of its facility; the steps the QF has taken to secure financing; the status of the QF's attempt to obtain environmental and other necessary permits; and documents exchanged between the utility and the QF.

In addition to the factors just discussed, SCE&G believes that it is imperative that the QF be able to honor its commitment to begin delivering power to the utility within a defined period. As noted above, payments to a QF under a LEO are based on estimates of a utility's avoided costs calculated at the time the LEO is established. Given that the utility's avoided cost changes over time, if the time between the establishment of an LEO (i.e., the QF's commitment to sell) and actual power delivery by the QF is lengthy, it is likely the avoided costs at the time of delivery of the power will be different (higher or lower), perhaps dramatically, than the avoided costs estimates at the commencement of the LEO. For example, without a defined delivery deadline, a QF could "commit" to sell in 2016 at 2016 avoided cost rates, but not build the generator and commence delivering power until 2019. SCE&G's avoided costs may have substantially changed during this delay period. If avoided

cost rates have decreased, there is no guarantee that SCE&G's customers will benefit because a QF with a LEO rather than a contract can simply walk away from its "commitment" to the deliver the output of its facility to SCE&G. If on the other hand, avoided cost rates have increased, SCE&G customers cannot walk away and must pay the QF the stale 2016 above-avoided cost rates. This is precisely the scenario that Lily Solar seeks to secure by attempting to lay claim to SCE&G's avoided cost rate as it existed on March 3, 2015, while simultaneously arguing that SCE&G's draft interconnection agreement should contain a three-year suspension period thereby allowing Lily Solar to delay the construction of its proposed facility until it is convenient for Lily Solar to construct it.

The Company recognizes that certainty in terms of the utility's avoided cost rates is important to QFs. It is equally important for SCE&G to be able to rely upon the QF's binding commitment to provide energy and capacity as of a specified date that can then be used to serve customers. Some jurisdictions, such as North Carolina, require larger QFs to obtain a Certificate of Public Convenience and Necessity ("CPCN") as a prerequisite step to establishing a LEO. Because QFs with a nameplate capacity of 75 MW or less are not required to obtain CPCNs in South Carolina, the Company does not believe North Carolina is a model to follow. Other jurisdictions have established bright-line LEO tests, including requiring a QF to express a binding commitment to execute a PPA with a price term consistent with the utility's avoided cost, for a specified term (including start and end dates) and with sufficient guarantees to ensure performance during the term of the contract.

Some jurisdictions also require a QF to obtain an executed interconnection agreement to establish an LEO. In Texas, a QF can only establish an LEO within ninety days of the date on which it will be able to deliver power from its facility. This so-called 90-day rule has been upheld on appeal by a federal appellate court, and ensures that the LEO is not an indefinite option for the QF to put its power to the utility at rates which no longer accurately reflect the utility's avoided costs. While the Company could certainly accept the 90-day rule, it believes that giving a QF 180 days after establishment of the LEO to commence delivery of power strikes the appropriate balance between the QF's interest and those of SCE&G's customers. The Company also believes it is appropriate for the QF developer to have executed an interconnection agreement committing the utility to build any required facilities and committing the QF to interconnect to SCE&G's system by a specified date not more than 180 days in the future and for the QF developer to have paid any deposits required in such interconnection agreement.

Q. ON PAGE 4, LINES 11 THROUGH 14, PROFESSOR LACY STATES THAT THE DRAFT LARGE GENERATOR INTERCONNECTION AGREEMENT WOULD HAVE EFFECTIVELY FIXED "THE PRICE SCE&G WAS OBLIGATED TO PAY, SCE&G'S AVOIDED COST." DO YOU AGREE WITH THIS STATEMENT?

A. No, I do not. As I stated earlier in my testimony, PPAs are the mechanism by which SCE&G establishes how much it will pay a QF for the power the

renewable energy generating facility delivers to the Company's system. A PPA is a different agreement from an interconnection agreement. An interconnection agreement will not contain "the price SCE&G was obligated to pay, the avoided costs," as Professor Lacy claims.

Q. WHAT IS SCE&G REQUESTING OF THE COMMISSION IN THIS PROCEEDING?

A. SCE&G respectfully requests that the Commission find that a LEO was not created at the March 3, 2015 initial scoping meeting, or at any other stage of the interconnection process, and expressly reject Lily Solar's attempt to lock-in for itself a 2015 avoided cost price point by claiming that a LEO was established at an initial scoping meeting concerning interconnection matters.

Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?

A. Yes.

EXHIBIT E

ecoplexus

101 Second Street, Ste. 1250
San Francisco, CA 94105
T 415 626 1802
F 415 449 3466

807 East Main Street, Ste. 6-050
Durham, NC 27701

www.ecoplexus.com

April 25, 2018

South Carolina Electric & Gas Company
Eddie Folsom
Power Marketing Manager
220 Operation Way
Cayce, SC 29033

RE: Power Purchase Agreement negotiations for the purchase of As-Available Energy and Capacity from a Renewable Energy Qualifying Facility.

Dear Mr. Folsom,

On March 29, 2017 South Carolina Electric and Gas delivered a PPA template to Ecoplexus for review and comment. On July 31, 2017 Ecoplexus responded with redline version of the PPA South Carolina Electric and Gas provided for Barnwell PV1 and Jackson PV1. South Carolina Electric and Gas confirmed receipt on August 9, 2017. Ecoplexus does not have record of South Carolina Electric and Gas returning comments or a redline of our July 31, 2017 markup. Ecoplexus would like to understand when comments may become available and continue this negotiation.

Ecoplexus is reasserting its commitment to sell energy, capacity, and other attributes for QF's identified in Exhibit 1, to South Carolina Electric and Gas for Barnwell PV1 and Jackson PV1 on July 31, 2017. Ecoplexus is also committing to sell energy, capacity and other attributes identified in Exhibit 1 to South Carolina Electric and Gas for Orangeburg PV1 and Winnsboro PV1. Accordingly, Ecoplexus further asserts its LEO date for Orangeburg and Winnsboro as identified in Exhibit 1 as satisfied upon receipt of this request.

Exhibit 1: Ecoplexus' Qualifying Facilities

Project	Max. Design Capacity	Fuel Type	Anticipated Commencement Date for Delivery	Qualifying Facility Self-Certification
Barnwell PV1	74.95 MW AC	Solar+Storage	Q4 2018	QF17-1467-000
Jackson PV1	70 MW AC	Solar + Storage	Q4 2018	QF17-1468-000
Orangeburg PV1	15 MW AC	Solar + Storage	Q2 2020 (Earlier is possible)	QF18-1040-000
Winnsboro PV1	50 MW AC	Solar + Storage	Q2 2020 (Earlier is possible)	Pending

Thank you for your attention to this matter. Please reach out with any questions or concerns and I look forward to further discussions.

Sincerely,

Michael R. Wallace
Vice President, Southeast Development

CC: Erik Stuebe
President, and Chief Commercial Officer

Ecoplexus Japan
2-28-4 Sendagaya
Inui Building 4th Floor
Shibuya-Ku, Tokyo, Japan

Ecoplexus Mexico
Paseo de la Reforma 350, 10th Floor
Colonia Juarez, CP 6600
Mexico City, Mexico

Ecoplexus Vietnam
16/F Saigon Tower
29 Le Duan Street, District 1
Ho Chi Minh City

ecoplexus

Paul Esformes
Corporate General Counsel

John Lynch
Sr. Corporate General Counsel

EXHIBIT F

SCE&G®
A SCANA COMPANY

John E. Folsom, Jr. (Eddie)
Power Marketing Manager

April 26, 2018

VIA ELECTRONIC MAIL

Michael R. Wallace
Vice President, Southeast Development
Ecoplexus
101 Second Street, Ste. 1250
San Francisco, CA 94105

Re: QF Power Purchase Agreement Negotiations

Dear Mr. Wallace:

I am in receipt of your letter dated April 25, 2018. In that letter, you state that Ecoplexus "does not have record of South Carolina Electric and Gas returning comments or a redline of our July 31, 2017 markup" of a PPA template that SCE&G delivered to Ecoplexus "[o]n March 29, 2017," and that "Ecoplexus would like to understand when comments may become available and continue this negotiation."

SCE&G emailed you its PPA template on March 28, 2017 (not March 29 as indicated in your letter), and on July 31, 2017, Ecoplexus submitted its redline markup of that template. However, during the over four month period between SCE&G's provision of a PPA template and Ecoplexus's submittal of its redline markup, SCE&G amended its PPA template to reflect changes based on lessons learned by SCE&G during the course of negotiating ten (10) PPAs totaling approximately 442 MWs, the terms of which were agreed to prior to the PR-2 rate change approved by Public Service Commission of South Carolina Order No. 2017-246. After a discussion with Ecoplexus earlier that day, by email dated August 21, 2017, SCE&G provided the new PPA template for Ecoplexus's review and comment, thereby withdrawing its prior offer. SCE&G has no record of receiving any edits or comments from Ecoplexus. By email dated April 16, 2018, SCE&G provided its current PPA template for Ecoplexus's review and comment, thereby withdrawing its prior offer. The current PPA template reflects further revisions as a result of SCE&G's experiences with other solar PPAs as well as changed circumstances. Based on the foregoing, it is clear that SCE&G has responded to Ecoplexus, and the ball is squarely in Ecoplexus's court. We look forward to your comments to our PPA template provided to you on April 16, 2018.

In your letter, you appear to assert a legally enforceable obligation "LEO" as a result of your stated "commitment to sell energy, capacity, and other attributes" for Barnwell PV1, Jackson PV1, Orangeburg PV1, and Winnsboro PV1. However, a LEO is an obligation, not an option for the QF to sell power to the utility if and when it so chooses. In order for a LEO to exist, there must be sufficient commitments from a QF obligating itself to sell electricity to the utility at specified rates, terms, and conditions. The QF also must demonstrate that it is has the ability to develop, construct and deliver power from its facility

within a defined period after the LEO is established. A LEO cannot be established by a project developer's statement that it intends to sell electricity to the utility in the future. Likewise, a LEO is not created when a project developer undertakes preliminary development steps that can be abandoned without material consequences (e.g., filing an interconnection request or self-certifying a proposed facility as a QF). Ecoplexus's actions to date—a mere statement of intent to sell electricity to the utility and self-certifying as a QF—do not demonstrate that Ecoplexus has established a LEO.

SCE&G has consistently explained that, in the absence of an executed PPA between a QF and a utility as a result of the conduct of the utility, a LEO arises if the QF can demonstrate that it is able to deliver its electrical output to the utility within 180 days. SCE&G last made this position clear to Ecoplexus and other solar developers at a meeting at the South Carolina Office of Regulatory Staff on July 20, 2017, which you attended on behalf of Ecoplexus. On July 27, 2017, SCE&G sent an email to Mr. Richard Whitt, the attorney representing Ecoplexus at the July 20th meeting, explaining its position on the requirements a QF must satisfy to establish a LEO. In short, Ecoplexus has not established a LEO.

Again, I look forward to receiving any comments on the PPA template forwarded to you on April 16, 2018.

Sincerely,

John E. Folsom, Jr.

cc: Daniel F. Kassis
Matthew W. Gissendanner, Esquire
(both via electronic mail)

EXHIBIT G

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2019-____-E

IN RE: Ecoplexus Inc. Complainant vs. South Carolina Electric & Gas Defendant	Certificate of Service

This is to certify that I, Kelli D. Martin, have this date served one copy of a Complaint in the above referenced matter to the person(s) named below by causing said copy to be deposited in the United States Postal Service, first class postage prepaid and affixed, and addressed as shown below:

Office of Regulatory Staff
Legal Department
1401 Main St., Ste 900
Columbia, SC 29201

Kelli D. Martin
Administrative Assistant

Dated: April 15, 2019.